Nine states with nonpartisan judicial elections include some limitation, like Minnesota Canon 5A(1), on political party activities.[4] In all, a total of 31 states have adopted one or both provisions similar to those at issue in the case below.

24, COLO. RULES OF JUD. DISCIPLINE, CODE OF JUD. CONDUCT, Canon 7B(2)(d) (West 2005); FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(1) (West 2005); IDAHO RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2001); ILL. COMP. STAT. ANN., CODE OF JUD. CONDUCT, S. Ct. R. 67, Canon 7B(2) (West 2005); IND. CODE ANN. tit. 34, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2002); KAN. S. CT. R. 601A, Canon 5C(2) (West 2002); KY. REV. STAT. ANN., S. CT. R. 4.300, KY. CODE OF JUD. CONDUCT, Canon 5B(2) (West 2005); LA. REV. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7D(1) (West 2005); MICH. COMP. LAWS ANN., CODE OF JUD. CONDUCT, Canon 7B(2)(a) (West 2005); MISS. RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2005); MO. RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5B(2) (West 2005); NEB. COURT RULES & PROC., CODE OF JUD. CONDUCT, Canon 5C(2) (West 2005); N.Y. JUDICIARY LAW, APP., N.Y. CODE OF JUD. CONDUCT, Canon 5A(5) (McKinney 2003); N.D. COURT RULES, CODE OF CONDUCT, Canon 5C(2) (West 2005); OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 7(c)(2)(a) (West 2005); OKLA. STAT. ANN., tit. 5, ch. 1, app. 4, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2001 & Supp. 2005); OR. RULES OF COURT, CODE OF JUD. CONDUCT, R. 4-102(D) (2005); PA. CONS. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7B(2) (West Supp. 2005); S.D. CODIFIED LAWS, ch. 12-16, APP., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005); TENN. RULES OF COURT, S. CT. R. 10, CODE OF JUD. CONDUCT, Canon 5C(2)(a) (West 2005); UTAH CODE OF JUD. ADMIN., ch. 12, CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2001); WASH. CT. RULES, CODE OF JUD. CONDUCT, Canon 7B(2) (West 2000); W. VA. CODE ANN., STATE COURT RULES, CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2004); WIS. CODE ANN. ch. 60, S. CT. R. 60.06(4) (West 2005); WYO. COURT RULES ANN., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005).

[4] Nine states limit statements of party affiliation. ARK. CODE ANN., CODE OF JUD. CONDuct, 5A(1)(f) and 5C(1)(a)(iii) (Lexis Nexis 2005); FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(3) (West 2005); KY. REV. STAT. ANN., S. CT. R. 4.300, KY. CODE OF JUD. CONDUCT, Canon 5A(2) (West 2005); MISS. CODE ANN. § 23-15-973 (West 2005); NEV. REV. STAT. ANN., S. CT. RULES, Part VI, NEV. CODE OF JUD. CONDUCT, Canon 5C(1)(ii) (West 2000 & Supp. 2005); OR. RULES OF

Because many other states have adopted provisions like those of Minnesota, the Eighth Circuit's ruling impacts not only Minnesota's judiciary and judicial candidates, but 30 other states across the nation as well. This far-reaching effect justifies this Court's review of the issues raised. *See, e.g., New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982) (noting that the provisions of New York's child pornography statute before the Court had identical or similar analogs in federal statutes and the statutes of 46 other states); *New York v. O'Neill*, 359 U.S. 1, 3 (1959) ("We granted certiorari [citation omitted] inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) ("Given the large number of States that limit political contributions [citation omitted], we granted certiorari . . . ."). Without this Court's review, provisions of the judicial canons of 31 states will be called into question.

B. Unsettled Questions in the Lower Courts Will Cloud the Conduct of Judicial Elections.

At the time of the Court's opinion in *White*, a significant number of cases in the lower courts had attempted to address limits on conduct by candidates for judicial office.[5] These

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COURT, CODE OF JUD. CONDUCT, R. 4-102(C) (2005); S.D. CODIFIED LAWS, ch. 12-16, APP., CODE OF JUD. CONDUCT, Canon 5C(1)(a)(ii) (Lexis Nexis 2005); WASH. CT. RULES, CODE OF JUD. CONDUCT, Canon 7(A)(1)(e) (West 2000); WIS. CODE ANN., ch. 60, S. CT. R. 60.06(2)(b) (West 2005). Two states allow speaking at party gatherings if the candidate's opponent is also invited to speak. ARK. CODE. ANN., CODE OF JUD. CONDUCT, Canon 5C(1); FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(3). Three States prohibit seeking party endorsement. ARK. CODE. ANN., CODE OF JUD. CONDUCT, Canon 5A(1)(d); IDAHO RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5A(1)(d) (West 2001); MISS. CODE ANN. § 23-15-973.

[5] *See, e.g., Morial v. Judiciary Comm'n*, 565 F.2d 295, 306-07 (5th Cir. 1977) (upholding constitutionality of provisions of Louisiana statute and

inconsistent rulings failed to provide a framework for evaluating the constitutionality of the states' judicial canons.

Following on the heels of *White*, lower courts have continued their struggle to strike a balance between First Amend-

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Code of Judicial Ethics requiring judges to resign from bench prior to running for elective non-judicial offices); *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1341-43 (N.D. Ga. 2000), *aff'd in part, rev'd in part*, 309 F.3d 1312 (11th Cir. 2002) (declaring provision of Georgia Code of Judicial Conduct prohibiting false statements to be unconstitutional); *Zeller v. Fla. Bar*, 909 F. Supp. 1518, 1529 (N.D. Fla. 1995) (granting preliminary injunction enjoining enforcement of provisions of Florida Code of Judicial Conduct regulating expenditure and solicitation of judicial campaign funds and solicitation of public support for judicial candidates); *Ackerson v. Ky. Jud. Retirement & Removal Comm'n*, 776 F. Supp. 309, 313-16 (W.D. Ky. 1991) (granting preliminary injunction enjoining enforcement of provision of Kentucky Code of Judicial Conduct prohibiting promises of conduct and statements regarding court administrative issues but upholding constitutionality of same provision regarding issues likely to come before court); *Clark v. Burleigh*, 841 P.2d 975, 988 (Cal. 1992) (upholding constitutionality of California statute limiting judicial candidate's statement for inclusion in voter's pamphlet to recitation of candidate's name, age, occupation, and brief description of background and qualifications and prohibiting reference to other judicial candidates); *In re Buckson*, 610 A.2d 203, 222-25 (Del. 1992) (upholding constitutionality of provisions of Delaware Code of Judicial Conduct requiring judges to resign from bench prior to running for elective non-judicial offices and prohibiting judges from attending political gatherings); *Summe v. Jud. Retirement & Removal Comm'n*, 947 S.W.2d 42, 47-48 (Ky. 1997) (upholding constitutionality of provision of Kentucky Code of Judicial Conduct prohibiting false statements); *In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000) (declaring provision of Michigan Code of Judicial Conduct prohibiting false statements to be unconstitutional but upholding constitutionality of narrower construction of provision); *In re Broadbelt*, 683 A.2d 543, 552 (N.J. 1996) (per curiam) (upholding constitutionality of provisions of New Jersey Code of Judicial Conduct prohibiting judges from commenting on pending proceedings and from lending prestige of their office to advance private interests of others); *In re Fadeley*, 802 P.2d 31, 38-40 (Or. 1990) (per curiam) (upholding constitutionality of Oregon Code of Judicial Conduct prohibiting judges from personally soliciting campaign contributions).

ment protections and the right of states to regulate the behavior of their judicial officers and candidates. But no clear consensus has developed.

For instance, in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit Court overturned Georgia's ban on personal campaign fund solicitations. "[W]e believe that the Supreme Court's decision in *White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections." *Weaver*, 309 F.3d at 1321. But *White* itself said no such thing: "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *White*, 536 U.S. at 783. Indeed, the high courts of Maine and New York have upheld restrictions on judicial campaign conduct even in light of *White*.[6] *See In re Dunleavy*, 838 A.2d 338 (Me. 2003) (upholding ban on sitting judges from soliciting support for political candidates and political organizations, and from purchasing tickets to political dinners or functions); *In re Raab*, 793 N.E.2d 1287, 1292 (N.Y. 2003) (upholding limitations on judicial candidates' participation in other candidates campaigns and contributions to political organizations that support other candidates or general party objectives; "the State's interest in ensuring that judgeships are not—and do not appear to be—'for sale' is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.").

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[6] Disciplinary bodies and judicial ethics advisory committees in a number of jurisdictions have stated that campaign speech restrictions not explicitly addressed by the *White* decision should continue to be enforced. *See* Cynthia Gray, *The States' Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163 (2002).

These conflicting opinions are to be expected. As one district court has noted:

> To say there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement. Whether the decision in *White* left *any* room for the regulation of speech of judicial candidates is a question yet to be resolved .... It has caused, and will continue to cause, considerable uncertainty and consternation on the part of judicial candidates.

North Dakota Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1041-42 (D.N.D. 2005). This confusion will permeate judicial elections across the nation.

No fewer than 30 states are set to hold elections of their high court judges in 2006. Justice at Stake, *Scheduled Supreme Court Elections 2006-2008*, http://www.justiceatstake.org/files/SCElections06to08.pdf. Absent guidance from this Court, judicial candidates are left in an untenable situation—either comply with potentially suspect rules, or worse, violate statues that are ultimately deemed constitutional and suffer prosecution and punishment. *See, e.g.*, *White*, 536 U.S. at 769 ("[F]earing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election."). To alleviate this state of confusion, the Court should provide guidance.

II. The Petition Presents The Opportunity For This Court To Address The Constitutionally Permissible Bounds Of Judicial Campaign Restrictions.

This case concerns both the role of the judiciary and public's trust in the courts. It is therefore important to the ABA, which promulgates judicial-ethics standards:

> Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The

> legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service.

White, 536 U.S. at 793 (Kennedy, J., concurring).

As the drafter of the Model Code of Judicial Conduct adopted in a majority of the states, the ABA must consider this Court's direct influence on the shape of judicial governance. The Model Code is being evaluated at the very time that this Court will consider granting certiorari in this case. How that Code is interpreted—and whether the Partisan Activities Clause and the Solicitations Clause will survive—is of great moment.

A. Judicial Independence, Integrity, and Impartiality are Critical Both to the Role of the Judiciary in American Government and the Public's Respect for the Courts.

"The citizen's respect for judgments depends . . . upon the issuing court's absolute probity." *White*, 536 U.S. at 793 (Kennedy, J., concurring). After all, "[j]udicial integrity is, in consequence [of public trust in a court's judgments], a state interest of the highest order." *Id.*

Following *White*, many lower courts have reviewed the judicial canons only in the context of the First Amendment. *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down Georgia's ban on personal campaign fund solicitations). They do so with no apparent consideration of the important distinctions between judicial campaigns and those of the political branches. But one of the primary purposes of judicial canons, and therefore of the ABA's model-code drafters, is the protection of judicial independence, integrity, and impartiality.

In American government, the judiciary serves as a counterbalance to the majoritarian executive and legislative

branches. While introducing the Bill of Rights to the first Congress, James Madison articulated the link between security of fundamental, personal rights and an independent judiciary:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 ANNALS OF CONG. 457 (Joesph Gales, ed., 1789) (reprinted in THE MIND OF THE FOUNDER 224 (Marvin Meyers, ed., 1973)). *See also* ALEXANDER HAMILTON, THE FEDERALIST NO. 78 ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

As this Court has noted, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *White*, 536 U.S. at 772-73 (quoting *Buckley*, 997 F.2d at 229). In handling this virtually infinite variety of matters, judges must resolve disputed cases and issues; they are not elected to represent geographic constituencies, or to further the interests and values of certain constituencies. *See id.* at 805-07 (Ginsburg, J., dissenting). "[T]he judge represents the Law—which often requires him to rule against the People." *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting).

Because of a judge's unique position in the government, the judicial branch has a need to create and maintain independence from "outside" influences. *See Buckley v. Illinois Jud. Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges

remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").[7] Put another way, judges are different from other governmental officials—and should be regulated differently too. "[S]tates need not treat candidates for judicial office the same as candidates for other elective offices" because "the judicial office is different in key respects from other offices." *Am. Civil Liberties Union of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990).

The *White* case produced five separate opinions. But it also produced agreement on two key points. The Court was unanimous in its beliefs that (1) an independent and impartial judiciary is central to American democracy,[8] and (2) judicial campaigns can present the possibility of undermining the public's confidence in the judiciary.[9]

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[7] *Compare Katz v. United States*, 389 U.S. 347, 364 (1967) (Douglas, J., concurring) ("Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested."), *with FrontLine: Justice for Sale* (PBS television broadcast Nov. 23, 1999) (transcript avail. at http://www.pbs.org/wgbh/pages/frontline/shows/justice/ interviews/supremo.html) (quoting Justice Kennedy, "[T]he law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral.").

[8] "It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary . . . ." *White*, 536 U.S. at 778 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., Kennedy, J., and Thomas, J.); "We of course want judges to be impartial . . . ." *Id.* at 788 (O'Connor, J., concurring); "Judicial integrity is, in consequence, a state interest of the highest order . . . ." *Id.* at 793 (Kennedy, J., concurring); "[T]he State [has an] interest in maintaining both the appearance in this form of impartiality and its actuality." (Stevens, J., dissenting, joined by Souter, J., Ginsberg J., and Breyer, J.); "[P]reserving the public's confidence in the integrity and impartiality of its judiciary [is a compelling state interest]." *Id.* at 817 (Ginsberg, J., joined by Stevens, J., Souter, J., and Breyer, J., dissenting).

[9] "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative

Given American democracy's need for judicial independence, integrity, and impartiality, the ABA has fostered standards that recognize the importance of these ideas. "Intrinsic to all sections of th[e] Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." ABA MODEL CODE OF JUD. CONDUCT (1990) (Preamble).

The ABA favors "an election process geared to the judicial office." *White*, 536 U.S. at 805 (Ginsburg, J., dissenting). In light of the Court's unanimity in endorsing the goal of preserving judicial integrity, the question left open by *White* is the constitutionally-permissible means of upholding this goal. This case provides an excellent opportunity to consider this important question.

B. The ABA Seeks This Court's Guidance in Crafting a Judicial Ethics Code That Promotes Judicial Independence, Integrity, and Impartiality.

This Court has noted the ABA's role in stating standards of judicial ethics. *See White*, 536 U.S. at 786 ("The first code

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office." *White*, 536 U.S. at 783 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., Kennedy, J., and Thomas, J.); "Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 790 (O'Connor, J., concurring); "[J]udicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system." *Id.* at 794 (Kennedy, J., concurring); "Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials . . . . There is a critical difference between the work of the judge and the work of other public officials . . . ." *Id.* at 797-98, 801 (Stevens, J., dissenting, joined by Souter, J., Ginsberg J., and Breyer, J.); "Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . ." *Id.* at 817 (Ginsberg, J., dissenting).

regulating judicial conduct was adopted by the ABA in 1924."); 48 ABA Reports 74 (1923) (report of Chief Justice Taft). Since its first involvement in promulgating the model code, the ABA's interest has been the same:

> [T]he American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

ABA CANONS OF JUD. ETHICS (1924) (Preamble).

The ABA's interest in judicial ethics extends to those cases discussing its Model Code. This case involves two provisions of the Minnesota Code of Judicial Conduct, which in turn are derived in part from the ABA Model Code of Judicial Conduct. *Compare* 52 MINN. STAT., CODE OF JUD. CONDUCT 5B(2) (the "Solicitation Clause") *and* 52 MINN. STAT., CODE OF JUD. CONDUCT 5A(1) (the "Partisan Activities Clause") *with* ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5 (1990).

The ABA expends tremendous effort in the formulation of its judicial ethics code. The ABA seeks input from groups spanning the entire legal community, including representatives of the ABA Judicial Administration Division Coordinating Committee, the Committee on Codes of Conduct of the Judicial Conference of the United States, the Center for Judicial Conduct Organizations, the American Judicature Society, the Josephson Institute for the Advancement of Ethics, and the Conference of Chief Justices. Additionally, federal and state judges in every jurisdiction provide feedback and in-

sights into working drafts. *See, e.g.*, JUDICIAL CODE SUBCOMM. OF THE ABA STANDING COMM. ON ETHICS & PROF. RESPONSIBILITY, DRAFT REVISIONS TO THE ABA CODE OF JUDICIAL CONDUCT (May 1, 1989).

Following this Court's decision in *White*, the ABA Standing Committee on Federal Judicial Improvements formed a working group on the First Amendment and Judicial Campaigns. *See* Eileen Gallagher, *Judicial Ethics and the First Amendment*, JUDGES' J. 26, 26 (Spring 2003). The purpose of the group was to "evaluate Canon 5 of the Model Code of Judicial Conduct in light of First Amendment concerns." *Id.* at 27.

Building upon the working group's deliberative efforts, the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct recently issued a new draft of Canon 5. *See* News Release, ABA, *ABA Releases Complete Final Draft of Revisions to Model Code of Judicial Conduct* (Dec. 21, 2005). This new version reflects the ABA's intensive iterative process to set reasoned restrictions on the political activities of judges and judicial candidates. *See id.* For instance, the final, complete draft differentiates ethical rules governing candidates in partisan elections from rules governing candidates in non-partisan elections (like those in Minnesota). *See id.*

Inasmuch as the provisions of the ABA's Canon 5 are now under study and redrafting, the ABA has an interest in learning this Court's reasoning about standards that relate to a judicial candidate's or judge's behavior on the campaign trail. The ABA respectfully requests this Court's review of the questions presented.

CONCLUSION

The Petition for a Writ of Certiorari to the Eighth Circuit should be granted.

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IN THE

Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*,

Petitioners,

CORRECTED COPY

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF THE *AMICI*[1]

Amici Curiae Concerned Corporations are thirty-nine (39) leading American corporations engaged in a broad range of industries, including manufacturing, retailing, and service, throughout the United States. Because of the size and breadth of their businesses, *Amici* are frequently parties in the nation's state courts, confronting all manner of controversies ranging from routine contract, tort, or personnel issues to cases involving serious long-term consequences for their companies. *Amici* have therefore been intensely interested in the operation of the state courts for many years. *Amici* are thus well-positioned to comment on trends affecting state courts, including those targeted by Minnesota's Code of Judicial Conduct provisions at issue in this case, dealing with direct solicitation of money and partisan political activities by candidates.

Amici do not quarrel with the choice by the majority of states to select their judges by means of a popular election process, as such decisions manifest a core democratic value that is at the heart of our system of government. *Amici* are aware, however, that many of these states are concerned that unregulated, partisan judicial elections have undesirable consequences that can be minimized, if not entirely eliminated, by modest governmental measures. *Amici* support these efforts. A choice to democratically elect judges need not entail the acceptance of all of the negative effects that may flow from partisan elections.

In particular, *Amici* are acutely aware of a number of troubling developments contributing to a decline in the perceived fairness of state courts and believe that the Minnesota provisions invalidated by the United States Court

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[1] No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *Amici Curiae* brief, and the parties' written consents are or will be on file with the Clerk of the Court.

of Appeals for the Eighth Circuit are modest and well-conceived efforts to address those problems. Nearly everywhere, the costs of running a competitive race for state judicial office are increasing,[2] along with the contentiousness of such elections—especially in light of the increasing focus on highly emotional "wedge issues" that often have little relation to the judicial office. And as the need for funds has increased, the personal involvement of the candidates in raising money has also become more important.

In *Amici*'s experience, both the degree of polarization around particular issues and the levels of campaign funding tend to be higher in judicial elections where political parties play a significant role.[3] In such contests, candidates are compelled to align themselves with a political party in order to obtain the voter and financial support that will allow them to be competitive. The partisan methods of attracting voters on ideological grounds and of spending large sums on advertising in turn expand and intensify the "wedge-issue" electioneering.

Not surprisingly, the candidates' dependence on campaign funds and political parties raises questions about the independence and impartiality of successful candidates once they are on the bench. Numerous empirical studies confirm that the general public and the bar share *Amici*'s concern. That concern rests on the risk that some judges who must raise large quantities of money and actively promote their partisan affiliation in order to secure election will be

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[2] For example, in 2004, the average amount raised by the winning candidate in the forty-three races for state supreme court seats in which candidates raised any money increased 45%—to over $650,000—from the 2002 judicial elections. Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004*, *available at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf.

[3] This is true both in judicial elections that are officially denominated as partisan and in non-partisan races in which political parties nonetheless are actively involved.

beholden to their supporters—including political party operatives in and out of government without whose assistance election would not have been (and re-election will not be) possible.

Finally, it has also been *Amici*'s shared experience that the prospect of increasingly costly, divisive, and partisan judicial elections discourages many of the most qualified candidates from seeking office and, likewise, discourages well-qualified judges from seeking re-election.

In these circumstances, *Amici* often find themselves between a rock and a hard place. As members of the communities in which they operate, and as regular participants in the judicial process, nearly all of the *Amici* are often approached with requests to contribute to judicial candidates in many of the 39 states employing electoral systems for the selection of judges. While *Amici* are keen to support a qualified judiciary, any decision to contribute to even the most promising candidate has the potential to create an appearance of seeking favor in any future litigation. That potential is only compounded where the judge himself makes the request. On the other hand, refusing to give may create a real or perceived disadvantage that neither the *Amici* nor their shareholders can lightly disregard.

The problem is by no means confined to *Amici*'s home jurisdictions or to circumstances in which they are affirmatively asked to contribute. *Amici* often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they are not located and have not contributed to or been solicited by judicial candidates. The phenomenon of being "home-towned" is a familiar one. As one leading plaintiff's counsel has described:

> [W]hat I call the "magic jurisdiction," . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established

> relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . .[4]

Fortunately, such "magic jurisdictions" in America are limited in number. But the disturbing trend toward highly partisan and divisive elections of judges serves only to increase the prospect for such mischief and creates a parallel phenomenon that is only somewhat less malignant: namely, that the prospect of being perceived as beholden to financial and partisan supporters discourages many of the best candidates from service.

INTRODUCTION

The provisions of Minnesota's Code of Judicial Conduct struck down by the decision of the *en banc* Eighth Circuit are modest and effective measures. While perhaps it is impossible to remove all concern that an electoral system funded by contributions will leave candidates beholden to their contributors, Minnesota's relatively modest bar on direct solicitation by candidates addresses this problem by insulating the candidate himself from the fundraising activity. And the bar on partisan identification or activities by candidates during the electoral process, while not

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[4] Richard Scruggs, *Asbestos for Lunch*, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), *in Industry Commentary* (Prudential Securities, Inc., New York), Jun[illegible] 2002, at 5 (transcript of comments of Richard Scruggs).